90-362

(1)

Supreme Court, U.S.
FILED
JUN 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

RECORD NO._____

IN THE

SUPREME COURT OF THE
UNITED STATES

JUNE TERM 1990

AVIS J. SMITH
PETITIONER

v.

U.S. AIR FORCE
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

AVIS J. SMITH, PETITIONER
380 COZINE AVE.#4A
BROOKLYN, N.Y.11207
(718)257-4534

PETITION FOR WRITE OF CERTIORARI

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Avis J. Smith petition for writ of certiorari to review a judgement of the United States Court of Appeals for the Second Circuit as follows:

I. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Does the use of Air Force mental health clinic based on Race, religion, harassment, mental torture for the purpose discriminating while a person was an active duty member and after being relieved from active duty constitute denial do process of law for which there is relief under the Civil Rights Act 1964- prohibiting discrimination based

on race and religion, etc.

(2) Does denial of due process for which there is relief under the Administrative Procedure Act, 6-11, 1972; 5 U.S.C.A. 551 et.seq., 3105, 3344, 5371, 7521, comply with after petitioner has proven that he has exhausted all administrative remedies.

(3) Does the denial of the right for the petitioner to have his case heard after proving with witness gross mis-treatment comply U.S.C. Sec. 1332, 42 U.S.C. Sec. 1981, 42 U.S.C. Sec. 1983 and 5 U.S.C. Sec. 702, providing for equal rights for all persons in every state and territory within the jurisdiction of the United States.

(4) Does not allow non-homosexuals as opposed to allowing homosexuals to have their cases heard in the courts of the United States

II. NAME OF PARTIES

The names of all parties are listed in the caption. The respective counsel is stated in the proof of filling and service.

III. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

TABLE OF CONTENTS

	PAGE
I. Questions Presented	1
II. Names of Parties	3
III. Table of Contents and Table of Authorities	3
IV. REFERENCE TO REPORTS AND OPINIONS	
V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION	8
VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	9
VII. STATEMENT OF CASE	9
A. Procedures in case	"
B. Facts of this case	"
Proof of Servie	17A

constitute reverse discrimination, as racial quotas, affirmative action.

Point 1- The Petitioner has been denied due process of law for which there is relief under the Administrative Procedure Act 6-11, 1972; 5 U.S.C.A. 551 et. seq., 3105, 3344, 5371, 7521.

Point 2- Petitioner has been denied due process of law in pursuant of U.S.C. Sec. 1332, 42 U.S.C. Sec. 1981, 42 U.S.C. Sec. 1983 and 5 U.S.C. Sec. 702, providing for equal rights for all persons in every territory and state within the United States.

Point 3- Anti-Discrimination Acts prohibited the harassment imposed on Petitioner.

Point 4- Medical Practice Act Prohibits the treatment Petitioner

received from the Air Force.

Point 5- Reverse Discrimination President set in the Allen Bockey case, would consider it discriminatory for the court to hear cases of Homosexuals and not Heterosexuals who were in the military.

Point 6- The Civil Rights Act of 1964 prohibiting discrimination based on race, religion, handicap etc. of which the Petitioner was put through while on and off active duty by the Air Force.

IV. REFERENCE TO REPORTS AND OPINIONS

Petitioner was denied the right to have his case heard based on alleged failure to exhaust administrative remedies, as shown in lower court decisions. This lead to the court to claim lack of jurisdiction over subject matter.

The letter from petitioners lawyer at

that time explains the Judges Decision at that time which the Air Force (Respondent) agreed to at that time. The letter dated, Feb. 1983 was advising petitioner not to appeal Judge Bramvells decision (82-Civ.2128) That Petitioner must wait until the Air Force makes a final disposition of his TDRL evaluations.

February 1, 1983

Mr. Avis J. Smith
932 Williams Avenue, #2B
Brooklyn, N.Y. 11207

RE: Smith v. United States
Air Force, et al

Dear Mr. Smith:

I have received your note indicating your determination to appeal in the above case. Please let me repeat my warning in my letter to you of Jan. 27, 1983, that in all likelihood any appeal would fail.

Let me quote the final paragraphs of the Judge's decision:

"Finally, the Court notes that since the Air Force has yet to make a final disposition of this matter, plaintiff's resort to this Court is premature under the disability retirement enabling statutes, which hold that the right to sue does not accrue until the Air Force makes a final determination.

Of course, any applicable Statute of Limitation would not commence running until then.

Accordingly, the defendant's motion to dismiss is hereby granted.

Settle an order on notice on or before January 28, 1983."

Since an appeal would require the printing of a rather voluminous record the cost to you would be $5,000, to be

paid in advance. You only have until February 25, 1983 to file an appeal.

I strongly urge that you get a second lawyer's opinion on your possibility on appeal, and any lawyer that you name I will be glad to let him see your file.

Sincerely,

Conrad J. Lynn

CJL/sad

V. STATEMENT OF GROUNDS TO INVOKE JURISDICTION.

Jurisdiction grounds sought to invoke are Administrative Remedies Act. Civil Rights Act 1964 prohibiting discrimination race, religion and handicap: Reverse Discrimination Law.
Also U.S.C. Sec. 1332, 42; U.S.C. Sec, 1981, 42 U.S.C. Sec. 1983 and 5 U.S.C. Sec. 702, providing for

equal rights for all persons in every state and territory within the jurisdiction of the United States.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Constitutional and Statutory Provisions involved are the same as item V.

STATEMENT OF CASE

Plaintiff (Petitioner) has shown that his military record was one of exemplary character and that never was he denied the right to extend or reenlist. Further he has proven that he was attacked and arrested and charged with trespassing while on military orders to be there for TDRL education illegally at Andrews Air Force Base, MD. Petitioner was accused of threatening the life of

President Ronald Reagan in 1982, by the C.I.A. as part of extended harassment from the Air Force. The rest of the information below will further explain the true facts of what was done to the Petitioner.

(1) Plaintiff enlisted in U.S. Air Force 7 Apr. 76. While in basic training at Lackland Air Force Base, Texas, Plaintiff took a by-pass exam scoring 90% and was given a direct duty assignment. The Air Force did not have to train Plaintiff because of the Plaintiff's previous training which included the following:

a) High School Diploma in Dental Technology.

b) Two year degree in Dental Technology (A.A.S.)

c) A certified Dental Technician

d) Passed all exams for his

teaching license to teach Dental Technology

e) Plaintiff had worked 9 1/2 years in the Dental Technology field, before entering the Air Force.

(2) Plaintiff was given a direct duty assignment to Chanute Air Force Base, Illinois, date of arrival 3 June 76. The following sequence of incidents occurred:

a) Plaintiff was asked by White Airman at the base dental clinic if he was on an Air Force minority program to get into Dental lab. technology, because some of them wanted dental lab. and could not get it.

b) Plaintiff was asked by a group of White Airmen, "Why did you come into the Air Force, with so much experience." Plaintiff stated, "I had four brothers in the Air Force,

my father was in the Navy for twenty years, so I joined the Air Force." Immediately after the Plaintiff said that, a White Full Bird Colonel Kenny L. Willarson said, "I'm going to have this guy checked out."

c) After this Plaintiff was being harassed and followed on the base and off the base. Plaintiff was kept under surveillance in his room and was followed by persons who knew what he was doing in his room when absolutely no one would have known. A Mexican male, who drove a silver Trans Am (Pontiac) with Arizona license plates was one who followed the Plaintiff on numerous amount of White males who harassed Plaintiff on and off base.

d) After persistent racist harass-ment, Plaintiff sent a certified

letter to his Squadron Commander Lt. Aker complaining about the harassment, the Squadron Commander stated, " I was raised White-Anglo Saxon Protestant, and can't relate to you and your ghetto experiences but I will send you to the mental health clinic."

Plaintiff was ordered to go to the mental health clinic only for racist reasons. This racism inspired more of the racist harassment, and a Full Bird Colonel Kenny L. Willarson, came at the Plaintiff with an Ax, and called him Blackie. This same Full Bird Colonel, after a result of back-ground checks, came at the Plaintiff in a harassing manner and stated, "It's those Black Muslims, isn't it Avis."

3) The Air Force Inspector General,

treated the Plaintiff as if the Plaintiff had done something wrong for making the complaint of the Colonel coming at the Plaintiff with an Ax and calling him Blackie.

4) Air Force Department of mental health, lied in a Congressional Inquiry concerning the first mental evaluation which was never done by a doctor, and is totally against good medical practice in an evaluation that was done based on race only.

5) Plaintiff attempts to have the first evaluation removed from his records, lead to a C.I.A. investigation because of Plaintiff's discovery of classified information electronics surveillance equipment being used for illegal purposes.

6) The C.I.A. assisted in making sure that the Full Bird Colonel (Willarson) got away with his part

in the harassment of Plaintiff, which included the use of electronics equipment used for tampering with the brain.

7) The C.I.A. tried to force Plaintif into working for the C.I.A., and Plaintiff disagreed with certain things and was tortured with electronics surveillance equipment. The C. I.A. (Air Force Intelligence) conducted an extremely long investigation of of Plaintiff which consisted of unnecessary harassment with help from certain top officials from the Original Nation Of Islam, who were named in the Amsterdam News in 1981 and on WLIB, in the same year.

8) In order to cover-up the C.I.A. (Air Force Intelligence) increased their harassment to force the Plaintiff out of the U.S. Air Force because of the information the Plaintiff has

on the use of surveillance.

9) The harassment against the Plaintiff was continued after he left the Air Force, and forced to go to TDRL evaluations, in order to have his case heard by the court.

Plaintiff has exhausted every possible possible legal means to resolve this case. Plaintiff has produced total evidence that he has exhausted every legal administrative remedy. Plaintiff finds that the Air Force demonstrated "Breach of good medical practice," as in Steeves v U.S. 294 F. Supp. 466 (D.C.S.C. 1968) in attacking the Plaintiff and taking him out of the hospital Psych-ward and arresting him and charging him with trespassing when he was admitted to the hospital and had orders carrying the stamp of the Secretary of the Air Force for him to be exactly where he was.

The Petitioner requested in writing to the Air Force Board For Correction of Military Records in 1981, for All five mental evaluations to be removed from his records. The Air Force Board For Corrections of Military Records was negligent in refusing to correct all evaluations before the diagnosis of Schizophrenia Paranoid Type, which had nothing to do with the five year TDRL evaluation period. The only diagnosis which caused the Petitioner to be put on TDRL was Schizophrenia Paranoid Type, no other diagnosis. The Air Force Board For Correction Of Military

Records reasons for not correcting my records were the following: 1) Petitioner was removed from duty because he was no longer able to perform his military duties.

Petitioners military records prove the Air Force's deliberate intent to lie.

2) The Air Force also stated that Petitioner had a well documented diagnosis Schizophrenia Paranoid Type. The negligence of the Air Force Board of Corrections is that they could have by law corrected all records before the diagnosis of Schizophrenia Paranoid Type by law.

The Air Force TDRL evaluation in 1982 (April), the Air Force stated in the Plaintiff's medical records that the Plaintiff was "COMPLETELY IMPAIRED," if this were truly the case, the Plaintiff should have been retired permanently with 100% at that time. The Air Force's failure to do so, demonstrates bad medical practice, and if the Plaintiff was not "COMPLETELY IMPAIRED," the Air Force is guilty of falsifying the Plaintiff's medical records.

The fact that the Air Force has produced mental health records, on the Plaintiff, as a result of racism, has caused considerable damage to the Plaintiff in ways that are both obvious and not so obvious. I ask the court to hear the Plaintiff's case and to have justice done.

The Petitioner (Plaintiff) has re-

IN THE

SUPREME COURT OF THE UNITED

STATES JUNE TERM 1990

NO._____

Avis J. Smith PETITIONER

v.

U.S. Air Force RESPONDENT

PROOF OF SERVICE

I, Avis J. Smith, do swear or declare that on this date, 13 Aug. 90, pursuant to Supreme Court Rules 29.3, I have served the Solicitor General, and the Respondent to PROCEED IN PETITION FOR A WRIT OF CERTIORARI on the parties to the above proceedings to be served by mail or hand carrying as indicated below.

Avis J. Smith

Avis J. Smith, Affiant

EPIFANIA G. CATINELLA
Notary Public, State of New York
No. 41-4960572
Certificate Filed in Queens County
Commission Expires 7/31/91

IN THE

SUPREME COURT OF THE UNITED

STATES JUNE TERM 1990

NO._____

_____

Avis J. Smith PETITIONER

v.

U.S. Air Force RESPONDENT

_____

_____

PROOF OF SERVICE

I, Avis J. Smith, do swear or declare that on this date, 13 May 90, pursuant to Supreme Court Rules 29.3, I have served the Solicitor General, and the Respondent to PROCEED IN PETITION FOR A WRIT OF CERTIORARI on the parties to the above proceedings to be served by mail or hand carrying as indicated below.

_____

Avis J. Smith, Affiant

EPIFANIA C. CATINELLA
Notary Public, State of New York
No. 41-4960572
Certificate Filed in Queens County
Commission Expires 12/26/91

quested a jury in the original complaint filed and was not granted any of his request. Petitioner, has also asked for $5,000,000 (five million) dollars in damages.

Avis J. Smith — Date: 13 Sep 82

Avis J. Smith

Petitioner (Pro-se Plaintiff)

APPENDIX

It is further noted that the suggestion for rehearing in banc has been transmitted to the judge of the court in regular active service to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH

Clerk

MMT:WFL:eag

F. #824887 JAN 27 1983

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

AVIS J. SMITH,

Plaintiff, ORDER

CIVIL ACTION

v. NO. CV82 2128

BRAMWELL, J.)

UNITED STATES AIR FORCE

KENNY L. WILLARSON,

Defendants.

Defendants United States Air Force and Kenny L. Willarson having moved to dismiss plaintiff's complaint pursuant to Rule 12(b) F.R.Civ.P., and the court having duly considered this matter; upon all the proceedings had herein, it is hereby

ORDERED that defendants motion is granted and plaintiff's complaint is

dismissed.

Dated: Brooklyn, New York

January 26th 1983

SO ORDERED

HON. HENRY BRAMWELL

U.S. District Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Avis J. Smith,

Plaintiff,

-against-

United States Air Force and

Kenny L. Willarson,

Defendants

82-Civ, 2128

Judge Bramwell

January 27, 1983

Enclosed please find the complete text of the decision and order of Judge Bramwell.

"THE COURT: Well, what I am going to do is, I am going to put the Court's decision on the record then.

You may be seated.

I will put it on record, and you can order it from the Reporter, if you wish a copy of it.

Defendant, United States Air Force, moves this morning, pursuant to Rule 12 (b) of the Federal Rules of Civil Procedures, to dismiss the plaintiff's complaint for affirmative injunctive relief, and money damages.

The plaintiff, Avis Smith, was diagnosed by the United States Air Force as being a paranoid schizophrenic and was accordingly

placed on the Temporary Disability Retired List, on February 2, 1981, with a thirty percent disability. While on this list, the member is evaluated at least once every 18 months to determine if there has been any change in his condition. A member may be kept on the list no more than five years. If within this time, the member's condition is found to sufficiently improve, he is returned to active duty. If, on the other hand, his condition is found to continue for a full five years, he is separated from the Service and receives benefits.

The plaintiff in this case was last evaluated in May of 1982, at which time his disability was evaluated at seventy percent.

Accordingly, he was kept in the

Temporary Disability List. He will next be evaluated in August of 1983. In any event, his five years on the list will not expire until February 1, 1986. During this time, there can be a final disposition either separating him or returning him to active duty.

Thus it comes as no surprise that when the plaintiff applied to the Air Force Board in October of 1981 for Correction of Military Records asking for dismissal of all mental diagnosis from his records, the Board denied his application as premature.

On July 21, 1982, plaintiff filed suit in this Court, asking for the relief outlined above.

I will first discuss the question of this Court's jurisdiction over these defendants. The plaintiff

cites as bases for jurisdiction; 28 USC Section 1332, the Diversity Statute, 42 USC, Sections 1981 and 1983 of Civil Rights Statutes, and 5 USC Section 702 of the Administrative Procedure Act.

28 USC Section 1332, gives this Court subject matter jurisdiction in diversity suits. Accordingly, the defendant would have to be a citizen of some State other than New York. Because the Court finds that the United States Air Force is not a citizen of any particular State, it concludes that it cannot be sued in diversity.

As to the claims for jurisdiction under 42 USC Sections 1981 and 1983, these two must fail. At the time the alleged wrongful act was done to him, plaintiff was an active duty member of the United

States Air Force. As such, he is considered a Federal employee. Numerous courts have held that section 1981 is not available to Federal employees alleging racial bias by a Federal Agency, Section 2000 E-16 of Title VII being the exclusive remedy.

As a Federal employee therefore, plaintiff cannot assert Section 1981 as a basis for jurisdiction in this suit against the Air Force. Likevise, this court has no jurisdiction under 42 USC 1983. Section 1983, by its very terms, has application only in these matters where persons are deprived of their rights under color of State and not Federal law.

With respect to the Administrative Procedure Act, the Court would merely note that there exists no

final agency determination for this Court's review.

In light of the foregoing, then this Court finds itself without jurisdiction over the United States Air Force for purposes of this action.

Turning to the individual defendants, Kenny L. Williarson, I note that the record reveals that he was not served with a summons by the plaintiff. Service of process, is of course, indispensable in order for the Court to have jurisdiction over a defendant unless there is a waiver.

Since there has been no such waiver in this case, I find that this Court lacks personal jurisdiction over Mr. Williarson.

Finally, the Court notes that since the Air Force has yet to make a

final disposition of this matter, plaintiff's resort to this Court is premature under the disability retirement enabling statutes, which hold that the right to sue does not accrue until the Air Force makes a final determination.

Of course, any applicable Statute of Limitation would not commence running until then.

Accordingly, the defendant's motion to dismiss is hereby granted.

Settle an order on notice on or before January 28, 1983.

If you wish a copy of this, order it from the Reporter."

AVIS J. SMITH,

Plaintiff,

-against-

THE UNITED STATES AIR FORCE,

Defendant,

MEMORANDUM

AND ORDER

88 CV 1837

McLaughlin, District Judge

Plaintiff, pro se, brings this action under 28 U.S.C. 1332, 42 U.S.C. 1981 and 1983, and 5 U.S.C. 702, seeking a permanent injunction enjoining defendant from discriminating against plaintiff and money damages for defendant's alleged unlawful and discriminatory treatment of plaintiff. Defendant moves to dismiss the complaint for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6).

FACTS

Plaintiff enlisted in the United

States Air Force on April 7, 1976, for a term of four years. Starting in May 1977, plaintiff's supervisor sent him on several occasions to the Air Force Mental Health Clinic for evaluation. On March 31, 1990, plaintiff was seen at the Mental Health Clinic at Osan Air Base, Korea, where he complained that the C.I.A. was conducting a "mind probe." He was diagnosed as having "Adjustment Reaction." On September 27, 1990, plaintiff complained that the Air Force Intelligence, the C.I.A., and the Korean C.I.A. were monitoring and recording his brain functions. He was hospitalized, and on October 10, 1980, was diagnosed as having schizophrenia, paranoid type. Plaintiff was subsequently returned to the United States for evaluation at David Grant Air Force Medical Center in Travis, California. The earlier

diagnosis was confirmed on December 2, 1980. A medical board consisting of three doctors, including a psychiatrist, then revieved the records and approved the diagnosis. Plaintiff's records were revieved once again by a Physical Evaluation Board at Randolph Air Force Base in Texas. On December 17, 1980, the Board agreed with the diagnosis, found that plaintiff's condition appeared permanent rendering him unfit for duty and recommended "Temporary Retirement" with 30% disability. The Plaintiff agreed with the findings and recommendations and stated that his reason for doing so was "to be relieved from illegal, racist, discriminatory confinement" by the Air Force Department of Psychiatry, Air Force Intelligence and the Central Intelligence Agency.

Plaintiff was separated from the Air Force on February 2, 1981, and was placed on the Temporary Disability List (TDRL).

According to General Military Law and Air Force regulations, an active duty member is placed on the TDRL if the agency cannot determine whether the member's condition is permanent. 10 U.S.C. 1202 (h). A member cannot be kept on the TDRL for more than five years, 10 U.S.C. 1202 (h), and during that period, the member is evaluated at least once every eighteen months to determine whether there is a change in the member's condition, 12 U.S.C. 1210 (a). If the member is found to have recovered, he is returned to active duty. 10 U.S.C. 1210 and 1211. If the condition is found to be permanent, the member is separated from the service and receives benefits which vary

according to length of service and percentage of disability. 10 U.S.C. 1210 (c) (d) and (e). If there is no change, the member is left on the TDRL.

According to these regulations, the plaintiff was reevaluated by the Physical Evaluation Board on May 10, 1982. The Board determined that the plaintiff was still unfit for active duty because of schizophrenia but was 70% compensible. Based on the change in the level of compensation, the Board recommended plaintiff's retention on the TDRL. The Secretary of the Air Force approved this recommendation.

On July 21, 1982, the plaintiff filed a lawsuit against the Air Force in the Eastern District of New York. Judge Bramwell, finding that the Air Force had not taken final administrative

action on the question of Plaintiff's retention or discharge, dismissed the action on the ground that the complaint was premature.

The Air Force took final action on the plaintiff's case on uly 12, 1985. That action, effective August 1, 1985, consisted of retiring the plaintiff at the grade of Sergeant with 30% disability. The plaintiff was also credited with four years, nine months and twenty-six days of active duty service.

DISCUSSION

1. 42 U.S.C. 1981 and 1983

Plaintiff claims that the Air Force discriminated against him in violation of 42 U.S.C. 1981 and 1983. The plaintiff's 1981 claim, however, is barred by the doctrine of sovereign immunity. Brown v. General Services Administration, 425 U.S. 820, 828-29,

96 S.Ct. 1961, 1966 (1976). Under that doctrine, the United States may not be sued without its consent and that consent is a prerequisite of jurisdiction. United States v. Mitchell., 463 U.S. 206, 212 103 S.Ct. 2961 2965 (1983). Because the United States has not waived its sovereign immunity on claims brought under 1981, this claim must be dismissed. similarly, the plaintiff's claim under 1983 is jurisdictionally deficient because that section only covers action under color of the state law. 42 U.S.C. 1983. Thus a claim against the federal government is not cognizable under this section. Ellis v. Blum, 643 F.2d 68, 83 n. 17 (2d Cir. 1981); Lynn v. United States Dep't of Health and Human Services, 583 F. Supp. 532, 533 (S.D.N.Y. 1984).

11. 5 U.S.C. 701-06

Plaintiff also cites the Administrative Procedure Act, 5 U.S.C. 701-06, a jurisdictional ground. Indeed, section 702 makes clear that a person wronged by agency action "is entitled to judicial review therefore." This section does not provide, however, a basis for jurisdiction in and of itself. There must be an independent basis for jurisdiction. California v. Sanders, 430 U.S. 99, 107, 97 S. Ct. 980, 985 (1977).

111. Tucker Act

Construing plaintiff's complaint as asserting claims under the Tucker Act, plaintiff requests "fringe benefits, adjustment, and other equitable relief for losses suffered as a result of defendant's unlawful acts." He estimates his damages to be $5 million. Assuming plaintiff's claims do not

sound in tort and because the damages resulting from those claims exceed $10,000, the Court of Claims has exclusive jurisdiction to hear the case. 28 U.S.C. 1346 (a) (2); 1491. This Court, therefore, to the extent that the plaintiff may be claiming damages under the Tucker Act, lacks jurisdiction over plaintiff's complaint.

IV. Feres Doctrine

If, on the other hand plaintiff's claim is based upon alleged tortious acts committed while he was a member of the military, the claim must be dismissed. It is clear that a tortious act committed against a military member by his superior or the government are not actionable in federal courts. United States v. Feres, 340 U.S. 135, 71 S.Ct. 154 (1950).

V. Exhaustion of Administrative Remedies

Finally, even assuming that a military member could sue for tortious acts, the plaintiff here has failed to exhaust his administrative remedies under the Federal Tort Claims Act. 28 U.S. C. 1346.

First, plaintiff failed to make any application to the Air Force Board for Correction of Military Records for correction or deletion of any of the alleged discriminatory or false statements made in plaintiff's mental health records. 10 U.S.C. 1552; 32 C.F.R. 865. 2(b). Plaintiff also failed to exhaust his administrative remedies with regard to any allegations of tortious conduct. In order to bring a federal court action, the litigant must first file an administrative claim with the agency, here

the Air Force, involved in the litigation. 28 U.S.C. 2410(b); see Wyler v. United States, 725 F. 2d 156, 159 (2d Cir. 1983) ("Absent compliance with administrative claim) requirements the action is barred by sovereign immunity and the district court has no subject matter jurisdiction"). Because the plaintiff did not file any administrative claim, the court lacks jurisdiction over any cause of action sounding in tort.

CONCLUSION

for the foregoing, defendant's motion to dismiss for lack of subject matter jurisdiction is granted.

SO ORDERED

Dated: Brooklyn, New York

July 12, 1989

Joseph M. McLaughlin,

U.S.D.J.

UNITED STATES COURT OF APPEALS FOR THE

SECOND CIRCUIT

EDNY

McLaughlin

88Civ.1837

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Court house in the City of New York, on the 26th. day of January, one thousand nine hundred and ninety.

PRESENT

Hon. Ellsworth Van Graafeiland

Hon. Rodger J. Miner,

Hon. John M. Walker, Jr.

Circuit Judges

Filed

Jan. 26, 1990

AVIS J. SMITH,

Plaintiff-Appellant,

-against- ORDER

89-6211

THE UNITED STATES AIR FORCE,

Defendant-Appellee.

UPON CONSIDERATION of this appeal from a judgement of the United States District Court for the Eastern District of New York (McLaughlin, J.), it hereby is affirmed.

Plaintiff-appellant Avis J. Smith appeals from a judgement entered in the United States District Court for the Eastern District of New York dismissing his complaint for lack of subject matter jurisdiction.

Smith commenced this action under 28 U.S.C. 132, 42 U.S.C. 1981 and 1983, and 5 U.S.C. 702, for injunctive relief and money damages, alleging

unlawful and discriminatory treatment by the Air Force. The district court dismissed the complaint on defendant's motion for lack of subject matter jurisdiction.

We affirm substantially for the reasons given in the comprehensive Memorandum and Order of district court, Joseph M. McLaughlin, Judge, dated July 12, 1989.

ELLSWORTH VAN GRAFEILAND,

RODGER J. MINER,

JOHN M. WALKER, JR.,

CIRCUIT JUDGES.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

FILED

MAR. 12 1990

At a stated term of the

United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twelfth day March, one thousand nine hundred and ninety.

Avis J. Smith,

Plaintiff-Appellant,

Dockett Number

89-6211

v.

THE UNITED STATES AIR FORCE,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard banc having been filed herein by appellant pro se Avis J. Smith

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is denied.